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ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Processes

Julia Ann Gold

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"Ultimately the most basic values of society are revealed in its dispute settlement procedures.
- Jerold S. Auerbach[1]

INTRODUCTION

I arrived for my second Nepali language class on time, but the teacher kept chatting about inconsequential things. I was paying by the hour, and we had already spent 25 minutes talking about nothing! A week later, I received an invitation to an art exhibit. The location was "Royal Museum," so that is where I went, only to find an empty building and no people. What had I missed? In my first meeting with the Dean of the Law Campus, we talked about trekking, the upcoming religious holidays, his visit to Seattle two years ago, relatives in the United States, but never directly addressed the reason for my visit that day. I thought I was there to learn what and when I would be teaching. What was going on here? What was I supposed to read between the lines in each of these encounters?

After a series of such experiences while living and teaching at Tribhuvan University Law Campus in Kathmandu, Nepal in 2003, I gained new insights into the extent to which culture permeates our interactions.[2] In experiencing the culture shock that greets anyone living in a new country, I became aware of the cultural baggage and assumptions I brought with me. Moreover, upon returning to the United States, I saw my own culture through new eyes. I began to notice the invisible differences at play within our own diverse society no less than in Nepal, including cultural effects upon our responses to conflict.[3] Those invisible differences are the focus of this article. When contemplating whether western-style

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1. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 3-4 (1983).

2. I would like to thank the Fulbright Commission U.S. Scholar Program and The Commission for Educational Exchange between the United States and Nepal for their support of my teaching and research in Nepal in 2003.

3. Conflict occurs within a cultural context. Conflict sometimes happens *because* of culture: different views about the sanctity of life, the extent to which rules should be followed, or misunderstandings due to different communication styles. Cultural values and patterns of communication also affect *how we address* those conflicts—the dispute resolution systems of a culture. This article focuses on the latter.

mediation could be a culturally appropriate method of dispute resolution for a hierarchical society like Nepal, I realized how deeply the American brand of naming, blaming and claiming[4] is embedded in our preferred dispute resolution approaches, and the extent to which dominant American cultural values have influenced the development of alternative dispute resolution as it has evolved in the United States.

While others have written about cross-cultural communication in specific types of disputes or countries, this article focuses on how understanding culture can assist American dispute resolvers working in the United States.[5] I review the reflection of American cultural values in primary dispute resolution processes, and assert that adversarial litigation values are largely, but not totally, consistent with dominant American culture.[6] These values exert a magnetic pull on developing alternative processes in the United States, legalizing and formalizing them so that they appear more like litigation.[7] I will also discuss how alternative methods of dispute resolution, particularly mediation, embody dominant American values that litigation ignores, creating a unique place for mediation despite the pull of litigation values.

My hope is that this discussion will help lawyers, neutrals and dispute resolution system designers in three ways: 1) increase awareness of the cultural underpinnings of our dispute resolution methods; 2) increase the ability of lawyers, neutrals and dispute resolution designers to recognize how cultural factors affect the parties in conflict, including how they respond to our American dispute resolution methods; and 3) help lawyers, neutrals and dispute resolution designers adapt

4. *See* William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631 (1980-81) (discussing the way disputes are transformed from unperceived injurious experiences to perceived injurious experiences (naming); to grievances (blaming); and ultimately to more formalized disputes (claiming)).

5. *See, e.g.*, Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L. J. 1 (1996) (discussing how mediation is the most readily transferable dispute resolution process for international business disputes using Mexico as an example); Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463 (2002) (presenting cultural framework of issues in dispute resolution as applied to Asia and the South Pacific). *See also* THE CONFLICT AND CULTURE READER (Pat K. Chew ed., 2001) (articles about how conflict and culture relate to each other).

6. The terms "American culture" and "dominant American culture" refer to the majority of middle class people in the United States, or "mainstream Americans." While litigation reflects strong individualistic and related values consistent with American culture, other values create a market for alternative processes, as discussed below. While most of the values associated with litigation are consistent with dominant American culture, some key values are divergent: power distance, locus of control and uncertainty avoidance.

7. Legal anthropologists view this phenomenon from a historical perspective as part of a continuing cycle of formalization, followed by informalization, then a return to formalization in disputing processes. *See, e.g.*, Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2067-68 (1987). Anthropologist Laura Nader describes the recurring cycle of adversarial models focused on right and wrong and what she calls "the pursuit of justice" to "harmony" models, including alternative dispute resolution, when disputing is silenced in favour of harmony. CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES 41, 50-54 (Kevin Avruch, Peter W. Black, & Joseph A. Scimecca, eds., 1991). *See also* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (Laura Nader & Harry F. Todd, Jr., eds., 1978) (looking at legal approaches to resolving conflict as one among many methods of disputing).

dispute resolution practices to be more culturally congruent, making room for a "new culture" at the table.[8]

Part I provides an overview of social science research on culture and cultural value patterns.[9] Much teaching and discussion of culture and dispute resolution has consisted of advice about how to negotiate with those from a different culture. This advice includes prescriptive rules on how to behave when dealing with a particular cultural group, like the Japanese or the French.[10] Here, instead, I will focus on cultural values that are most relevant to dominant American culture, and present a framework that can be layered over litigation, arbitration and two mediation models to show how the processes vary in cultural terms. This framework is based on research and study in social psychology, sociology, anthropology, and intercultural communication.

Because they are most relevant to the evolution of dispute resolution in the United States, and particularly mediation, I discuss five cultural value patterns—individualism and collectivism; universalism and particularism; power distance; uncertainty avoidance; and locus of control. In addition, I discuss two culturally influenced communication styles—low or high-context communication, and monochronic or polychronic time orientation. I then describe dominant American culture, and where it falls in relationship to these cultural value patterns and communication styles.

Part II analyzes how cultural values and communication styles are reflected in litigation, arbitration, and two styles of mediation. Finally, Part III discusses the implications of applying cultural value patterns to dispute resolution methods, and provides an example of the framework applied in a community mediation context to increase cultural congruence.

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8. While the focus of this article is domestic dispute resolution, understanding the role that cultural values take in shaping dispute resolution practices will help consultants and planners avoid an ethnocentric approach when they take American dispute resolution systems abroad. For discussion of taking the American "rule of law" to cultures with different values, see Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275 (2003). *See also* Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance under Post-Communist Democratization Programs,* 2002 J. DISP. RESOL. 327; Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice,* 5 HARV. NEGOT. L. REV. 339 (2000).

9. Psychologists, sociologists, and anthropologists have been studying cultural value patterns since the post World War II period. Much research has been inspired by the need to assist diplomats and aid workers in foreign countries, students participating in foreign exchange programs, and more recently, corporations operating around the globe. While communication between cultures has been happening since before recorded history, the study of culture, particularly intercultural communication, expanded as an academic field of study in the United States during the period following World War II. As Americans began to work and travel more overseas, and the population within the United States grew more diverse, the field of intercultural communication gained in popularity as an academic endeavor. *See, e.g.,* FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS 8-11 (2d ed. 1998); Mariano Grondona, *A Cultural Typology of Economic Development, in* CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 44-55 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); Gary R. Weaver, *Contrasting and Comparing Cultures, in* CULTURE, COMMUNICATION AND CONFLICT (Gary R. Weaver ed., 2d ed. 2000).

10. *See, e.g.,* RAYMOND COHEN, NEGOTIATING ACROSS CULTURES: COMMUNICATION OBSTACLES IN INTERNATIONAL DIPLOMACY (1991); GLEN FISHER, INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE (1980); TERRI MORRISON ET AL., KISS, BOW, OR SHAKE HANDS: HOW TO DO BUSINESS IN SIXTY COUNTRIES (1994).

I. CULTURE AND VALUE PATTERNS

A. *What is culture?*

Culture permeates our interactions. The most commonly understood meaning of the word "culture" is "civilization" or the refinements of a civilization such as music, literature, drama or dance, sometimes called "objective culture."[11] Less obvious aspects of culture—the psychological features that define groups of people, or "subjective culture"[12]—are the focus of this article. Culture may be defined as "the shared assumptions, values, and beliefs of a group of people which result in characteristic behaviors."[13] While culture may change and adapt through contact with outsiders, the deep structure of a culture, including values and beliefs, tends to persist from generation to generation.[14]

Culture is different from "human nature," which is universal and shared by all human beings, and "personality," which is unique to the individual.[15] The relationship of these three can be conceptualized as a pyramid,[16] with human nature at the base, representing common human traits such as the ability to feel fear, love, anger, sadness and joy.[17] These traits are inherited with our genes and shared by all humans. At the next level is culture: what we have collectively learned within our environment about how to manifest fear, love, anger, sadness and joy.[18] Most but not all people within a societal group will share these behaviors. Finally, at the top of the pyramid is personality, which is the way each individual expresses him or herself, influenced by inherited traits, unique life experiences and, of course, culture.[19]

Culture is inherently collective, because it is shared with those who come from the same physical and social environment. "The assumption . . . is that general cultural values influence individuals' attitudes and behaviors within particular social situations. . . . [T]hese values represent general perspectives on what is good or desirable in life. Such general perspectives are further suggested to develop out of membership within particular cultures."[20] Culture is learned, not inherited, and is reinforced by interactions within the family, schools, membership

11. Milton J. Bennett, *Intercultural Communication: A Current Perspective, in* BASIC CONCEPTS OF INTERCULTURAL COMMUNICATION 1, 3 (Milton J. Bennett ed., 1998). *See also* GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 5 (1997) [hereinafter HOFSTEDE, SOFTWARE].

12. Bennett, *supra* note 11, at 1, 3.

13. CRAIG STORTI, FIGURING FOREIGNERS OUT 5 (1999) [hereinafter STORTI, FOREIGNERS]. As long ago as the 1950s, scholars identified more than 160 different definitions of the word "culture," and today there are even more. STELLA TING-TOOMEY, COMMUNICATING ACROSS CULTURES 9 (1999). Another definition is "a complex frame of reference that consists of patterns of traditions, beliefs, values, norms, symbols, and meanings that are shared to varying degrees by interacting members of a community." *Id.* at 10.

14. LARRY A. SAMOVAR & RICHARD E. PORTER, INTERCULTURAL COMMUNICATION 9 (9th ed. 2000) [hereinafter SAMOVAR, COMMUNICATION].

15. HOFSTEDE, SOFTWARE *supra* note 11, at 6.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 5-6.

20. Tom R. Tyler, E. Allan Lind & Yuen J. Huo, *Cultural Values and Authority Relations*, 6 PSYCHOL. PUB. POL'Y & L. 1138, 1139 (2000).

organizations, faith communities, the workplace, and the media. By observing the behavior of others around us, we learn about details such as the uses of eye contact, the uses of space and silence, and the treatment of children or elders.

Culture shapes perception.[21] Perception enables us to make sense of the world as we experience it through sensory receptors of sight, sound, touch, smell and taste.[22] Perception is both learned and selective.[23] Perception is influenced by what we have learned in our environment. For example, a devout Hindu may see a cow as a revered incarnation of the goddess Laxmi, a Masai tribesman may see the cow as a measure of wealth and status, and an American may see it as a McDonald's "Happy Meal."

Because each individual selects, evaluates and organizes external stimuli in a unique way, the "same" events can be interpreted completely differently by two individuals. There are so many stimuli surrounding us that we can allow only selected data through to our conscious minds. The selective nature of perception is exemplified in a classic study by James W. Bagby in which subjects from Mexico and the United States viewed, for a split-second, stereograms in which one eye was exposed to a baseball game and the other to a bullfight.[24] For the most part, the subjects from the United States saw only the baseball game and the Mexican subjects saw only the bullfight.[25] The subjects' internal processors selected certain information based on what was familiar to them from past experience, and ignored other information that was not familiar.[26] A tragic example of selective processing comes from the December 2004 Asian tsunami: some native island groups were able to escape the oncoming waves when elders with past experience of tsunamis recognized subtle changes in the environment that were ignored or unnoticed by others less attuned to the miniscule changes.[27]

Our perceptions and resulting interpretations reflect all our past life experiences, including cultural influences. The more shared life experience we have with another person, the more similar our perceptions tend to be.[28] Perceptions are stored within each human being in the form of beliefs and values. "These two, working in combination, form what are called cultural patterns."[29] Beliefs are learned and guide our thoughts and actions, serving "as the storage system for the

21. Perceptions play a key role in conflict resolution because different perceptions of the same event often lead to conflict.

22. SAMOVAR, COMMUNICATION, *supra* note 14, at 10.

23. *Id.* at 54.

24. James W. Bagby, *Cross-Cultural Study of Perceptual Predominance in Binocular Rivalry*, 54 J. OF ABNORMAL AND SOC. PSYCHOL. 331, 331-34 (1957).

25. *Id.* at 333-34.

26. *Id.* at 334.

27. V. Raghavendra Rao, Director of the Kolkatta-based Anthropological Survey of India told reporters: "These tribes live close to nature and are known to heed biological warning signs like changes in the cries of birds and the behaviour patterns of land and marine animals." Ranjit Devraj, *Tsunami Impact: Andaman Tribes Have Lessons to Teach Survivors*, Inter Press Service News Agency, Jan. 6, 2005, *available at* http://www.ipsnews.net/africa/interna.asp?idnews=26926. The Associated Press reported: "Government officials and anthropologists believe that ancient knowledge of the movement of wind, sea and birds may have saved the five indigenous tribes on the Indian archipelago of Andaman and Nicobar islands from the tsunami that hit the Asian coastline Dec. 26." Neelesh Misra, *Stone Age Cultures Survive Tsunami Waves*, Jan. 4, 2005, http://msnbc.msn.com/id/6786476/.

28. Benjamin J. Broome, *Palevome: Foundations of Struggle and Conflict in Greek Interpersonal Communication*, *in* SAMOVAR, COMMUNICATION, *supra* note 14, at 112.

29. SAMOVAR, COMMUNICATION, *supra* note 14, at 54.

content of our past experiences, including thoughts, memories, and interpretations of events."[30] Our beliefs tell us whether we have a dog for a pet or for dinner; whether we bury our dead or leave the body for vultures to pick clean. Beliefs also guide our views about where to go for spiritual guidance or at what age men and women should marry. When growing up, we learn these things, come to accept them as true and behave accordingly or, if not, we experience negative reactions from those around us—we are considered "deviant" or "odd."

Beliefs form the basis of our values. Values are a learned organization of rules for making choices and for resolving conflicts.[31] Values form the basis of social norms and "teach us what is useful, good, right, wrong, what to strive for, how to live our life, and even what to die for."[32] Many values are unconscious to those who hold them, but they form the core of culture. By the age of ten most children have formed their value system.[33] Values can be both individually held and permeate a culture, creating cultural value patterns. See Figure 1, below.

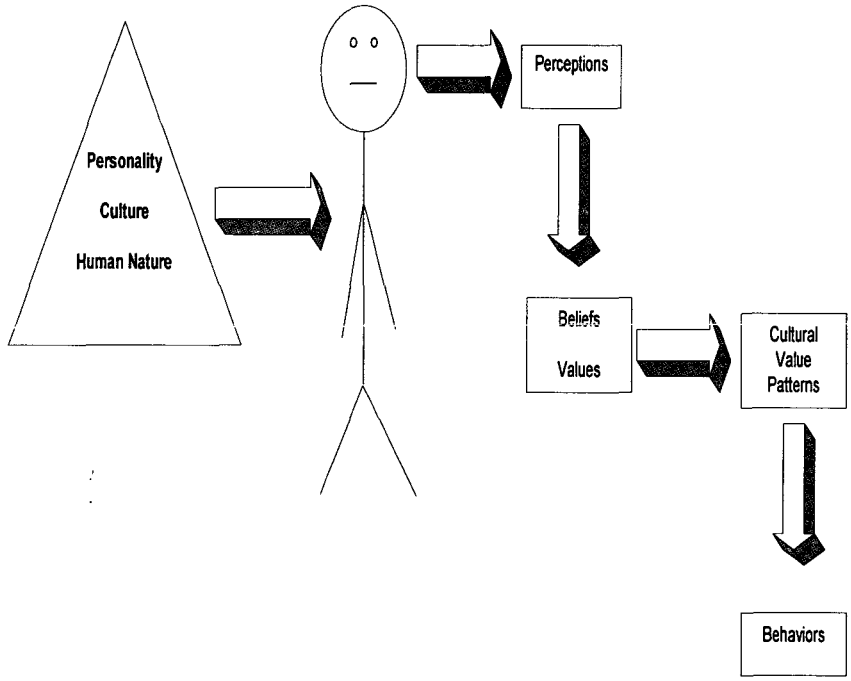

Figure 1

30. LARRY A. SAMOVAR & RICHARD E. PORTER, COMMUNICATION BETWEEN CULTURES 48 (5th ed. 2004) [hereinafter SAMOVAR, CULTURES].
31. MILTON ROKEACH, THE NATURE OF HUMAN VALUES 14 (1973).
32. SAMOVAR, CULTURES, *supra* note 30, at 57.
33. HOFSTEDE, SOFTWARE, *supra* note 11, at 8.

B. Cultural value patterns

Cultural values become visible through behaviors, operating as a set of unwritten rules that guide the ways we communicate and interact. In discussing and comparing national groups, researchers have identified characteristic behaviors within those groups. Similarities and differences across societies are explained and predicted theoretically using dimensions of cultural variability, called cultural value patterns.[34]

Value patterns are constructs for discussion of cultural differences among national groups and individuals. While everyone within a particular national group will not share the same values, a majority of individuals within that group will conform to similar values, creating what we call the "dominant culture."[35] Those who do not conform to the dominant culture will exhibit different cultural values, creating subcultures and co-cultures.[36] Within the dominant culture and subcultures, individuals inhabit multiple levels of culture, from national identity to family, professional or workplace identity, or regional, gender and generational affiliations. These layers of cultural affiliation affect everything we do, including how we resolve conflict for ourselves and our beliefs about how others should resolve conflict.

Five cultural value patterns and two communication styles are most relevant to dispute resolution.[37] Two cultural value patterns correlate highly to the communication styles: the individualism-collectivism and universalism-particularism continua,[38] and the communication styles low-context/high-context and monochronic/polychronic time. For example, individualist cultures tend to be universalist, use low-context communication, and have a monochronic sense of time.

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34. GEERT HOFSTEDE, CULTURE'S CONSEQUENCES 1-36 (2d ed. 2001) [hereinafter HOFSTEDE, CONSEQUENCES]; HOFSTEDE, SOFTWARE, *supra* note 11, at xv (describing these value patterns in terms of cultural "dimensions"); William B. Gudykunst & Carmen M. Lee, *Cross-Cultural Communication Theories*, *in* CROSS-CULTURAL AND INTERCULTURAL COMMUNICATION 7 (William B. Gudykunst ed., 2003). For a discussion of specific aspects of American cultural value patterns see, e.g., EDWARD C. STEWART & MILTON J. BENNETT, AMERICAN CULTURAL PATTERNS (1991); CRAIG STORTI, AMERICANS AT WORK: A GUIDE TO THE CAN-DO PEOPLE (2004) [STORTI, AMERICANS].

35. Bennett, *supra* note 11 at 157-58.

36. Co-culture is used to describe "groups or social communities exhibiting communication characteristics, perceptions, values, beliefs, and practices that are significantly different enough to distinguish them from the other groups, communities, and the dominant culture. [But] because they live within the dominant culture, [co-culture groups] often share many patterns and perceptions found within the larger dominant culture." SAMOVAR, CULTURES, *supra* note 30, at 11.

37. I rely heavily on research conducted by Geert Hofstede, Edward T. Hall, and others. Hofstede, a Dutch social psychologist, studied IBM employees in 50 countries from 1966 to 1978. HOFSTEDE, SOFTWARE, *supra* note 11, at xv. Hofstede's empirical research on differences among national cultures resulted in four dimensions of cultural difference: power distance, collectivism versus individualism; femininity versus masculinity; and uncertainty avoidance. *Id.* Some of the earliest research into cultural value orientations was conducted by cultural anthropologists Florence R. Kluckhohn and Fred L. Strodtbeck. They posited that every person must deal with five universal questions: 1) What is the character of innate human nature? 2) What is the relation of man to nature? 3) What is the temporal focus of human life? 4) What is the value placed on human activity? and 5) What is the relationship of people to each other? FLORENCE R. KLUCKHOHN & FRED L. STRODTBECK, VARIATIONS IN VALUE ORIENTATIONS 11 (1961). *See also* TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 26-27; H.C. TRIANDIS, INDIVIDUALISM AND COLLECTIVISM 9 (1995).

38. The placement of national groups in relation to the cultural value patterns can be visualized as points along a continuum. *See* Figure 2, *infra*.

The remaining three value patterns are power distance, uncertainty avoidance and locus of control.

1. Individualism-collectivism. This dimension describes the relationship between the individual and larger society. Individualists believe it is important to satisfy the needs of the individual before those of the group. Individual identity is more important than group identity; and individual rights are more important than group rights. One is expected to look after oneself, be self-sufficient, autonomous and independent. Personal freedom is highly valued in an individualistic society. Privacy is respected, and personal information is not shared except with close friends or family. Family groups typically include only parents and children. Only one-third of the world's population live in individualist societies; the remaining two-thirds are collectivist.[39] The United States dominant culture is highly individualistic, falling at the extreme end of the individualism-collectivism continuum.[40]

In a collectivist culture, identity is tied to a primary group, usually the family. Members of a collectivist society believe that the survival of the group will ensure each member's survival because the success of the group benefits the individual. A typical family group includes multiple generations, and extended family (adult children, aunts and uncles, and grandparents) often live together. In a collectivist society, one is rarely alone. The level of interdependence means that harmony is highly valued. Guatemala, Ecuador, Egypt and Nepal are highly collectivist cultures, falling at the far end of the collectivist continuum.[41]

The relative importance of ingroups and outgroups is a critical dimension in individualist versus collectivist cultures. Ingroups are groups of individuals "about whose welfare a person is concerned, with whom that person is willing to cooperate without demanding equitable returns, and separation from whom leads to anxiety."[42] Members of ingroups tend to perceive a common fate, and highly value loyalty within the group. The outgroup (everyone else) is perceived as separate, unequal, distant or even threatening.[43]

Members of collectivist cultures emphasize the importance of ingroups and outgroups more than individualist cultures. Members of individualist cultures tend to have many specific ingroups (familial, religious, professional, social) that might affect their behavior in a specific situation, but because of the larger number of ingroups, the influence is less than in a collectivist culture where a small number of ingroups (family, work groups) exert a larger influence.[44]

Collectivists distinguish between ingroups and outgroups regarding how resources should be shared or divided. They use equality or need as the basis for distribution to ingroup members, and equity (to each person according to their

39. STELLA TING-TOOMEY & JOHN G. OETZEL, MANAGING INTERCULTURAL CONFLICT EFFECTIVELY 30-31 (2001).

40. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 215 (ranking the United States as the most individualistic country in the world, as number 1 of 50 countries and three regions). *See also* TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 52.

41. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 215; TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 52.

42. TRIANDIS, *supra* note 37, at 9.

43. TING-TOOMEY & OETZEL, *supra* note 39, at 38.

44. SAMOVAR, CULTURES, *supra* note 30, at 9-10.

contribution) as the basis for outgroup members.[45] For example, in a collectivist society, a rich family member would be expected to share the wealth with her extended family.

How a society handles those who deviate from societal norms differs in individualist versus collectivist cultures. Individualist cultures tend to focus on guilt, which is an individual feeling. In collectivist societies, shame is more important, because the infringement reflects on the larger group, not just the individual.

> Shame is social in nature, guilt individual; whether shame is felt depends on whether the infringement has become known by others. This becoming known is more of a source of shame than the infringement itself. Such is not the case for guilt, which is felt whether or not the misdeed is known by others.[46]

2. Universalism-particularism. Related to the individualism-collectivism dimension[47] is the universalism-particularism dichotomy.[48] This dimension measures how one balances obligations to one's ingroup with obligations to society at large. Individualist societies take a "universalist" perspective, which is to apply rules across the board. A universalist believes that what is right is right, regardless of the circumstances or who is involved. Certain absolutes exist and the same rules should apply to similar situations. To a universalist, fairness means treating everyone the same, and one should not make exceptions for family, friends, or members of one's ingroup. Universalists believe it is important to put feelings aside and look at situations objectively. Making exceptions to rules should be avoided. Switzerland and the dominant United States culture are at the extreme end of universalism.

In contrast, particularists believe that circumstances should be taken into account, and that what is right in one situation may not be right in another.[49] They believe it is important to maximize benefits to members of their ingroup—others will be fine, because their ingroups will protect them. Rather than being laid aside, personal feelings should be relied upon. Particularists accept that exceptions will always be made for certain people. To a particularist, being fair means treating each person as unique.[50] Venezuela, Russia and Nepal are examples of very particularist countries.[51]

3. Communication patterns. Communication styles, and the meaning attached to nonverbal messages and time also vary across cultures, and are rooted in

45. TRIANDIS, *supra* note 37, at 73. *See also* Gunter Bierbrauer, *Cultural Differences and Legal Consciousness: Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism Between Kurds, Lebanese, and Germans,* 28 LAW & SOC'Y REV. 243, 246-47 (1994).

46. HOFSTEDE, SOFTWARE, *supra* note 11, at 60-61.

47. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 212.

48. TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 35.

49. *Id.*

50. *Cf.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43, 48-50 (2004) (describing the debate in China between "legalists" and "Confucians." Legalists support following the rule of law so that results are predictable and uniform. Confucians, on the other hand, argue that social and cultural norms, as interpreted by the rulers, should govern. Rulers consider the interests of the community over an individual's interests.).

51. TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 35-39.

cultural values. Two style dichotomies are relevant to this discussion: low-/high-context and monochronic/polychronic time orientation, which vary along continua similar to value patterns.

a. Low-/high-context communication. Anthropologist Edward T. Hall identified the communication style continuum called "low-context" to "high-context." Low and high-context refer to how much of the meaning of a communication comes from the surrounding context, as opposed to the actual words exchanged.[52] In a low-context culture, people tend to say exactly what they mean rather than to suggest or imply. The spoken word carries most of the meaning. People are not expected to read into what is not said or done to embellish the meaning. The goal of most communication is getting or giving information, as opposed to preserving the relationship, which is the goal in high-context communication.

Low-context communication is more common in individualistic cultures, where there is less reliance on shared experiences as a basis for understanding. Because there is less shared experience and history, the speaker must convey background information and spell things out in detail. The United States is a very low-context culture.[53]

In a high-context culture, much of the meaning of a communication is already "programmed" into the receiver of the message as a result of the shared experience, connection and history of the sender and the receiver. People are more likely to infer, suggest and imply than say things directly. Often no words are necessary to carry the message—a gesture or even silence is sufficient to communicate meaning. A critical component of most communication is to preserve the relationship and face-saving is important. This leads to a tendency to be indirect and avoid confrontation.

There is a strong correlation between high-context communication and collectivist cultures. For example, communication among ingroup members is grounded in common perspectives and perception so there is little to spell out or explain to get the message across. Japan and China are very high-context societies.[54]

b. Monochronic—polychronic. Hall also identified two time orientations that vary and affect communication across cultures.[55] A monochronic culture perceives time as linear, quantifiable, and in limited supply. In these cultures people believe that it is important to use time wisely and not waste it. Efficiency is important, which leads to a sense of urgency. The needs of people are adjusted to suit the demands of time, resulting in schedules and deadlines. It is considered most efficient to do one thing at a time. Unforeseen events should not interfere with plans, and interruptions are seen as a nuisance. Dominant United States culture is very monochronic.[56]

In a polychronic culture, time is perceived as limitless, and not quantifiable. There is a sense that there is always more time. Time is adjusted to suit the needs of people. Schedules and deadlines get changed. People may need to do several things simultaneously. It is considered okay to split attention between several

52. EDWARD T. HALL, BEYOND CULTURE 105-28 (1989).
53. STORTI, FOREIGNERS, *supra* note 13, at 99.
54. *Id.*
55. EDWARD T. HALL, THE DANCE OF LIFE: THE OTHER DIMENSION OF TIME 44-47 (1989); STORTI, *supra* note 13, at 82.
56. STORTI, FOREIGNERS, *supra* note 13, at 82.

people or tasks, and it is not necessary to finish one thing before starting another. Strictly speaking, there is no such thing as an interruption. Latin American, African, and Middle Eastern cultures all tend to be polychronic.

4. Power distance. Measured from low to high,[57] power distance refers to the extent to which the less powerful members of a society "expect and accept that power (e.g. wealth, prestige, access to education and other benefits that enhance power) is distributed unequally."[58] In a low power distance culture, individuals see inequities as man-made and largely artificial. Those with power tend to deemphasize it, minimize differences between themselves and subordinates, and delegate and share power to the furthest extent possible. Subordinates are encouraged to take initiative and are rewarded for it. Informality is encouraged. In a low power distance culture, criticism of authorities is considered appropriate, and discussion and consultation are desirable.

Parents in a low power distance society encourage children to be independent and to find their own way. Teachers treat students as equals. The educational process is student-centered. Arguing with a teacher is acceptable, and teachers encourage independent thinking and self-study. The same dynamics exist in the workplace. The salary range between the boss and subordinates is relatively small, and privileges for more highly placed employees are few.[59]

In a high power distance society, people tend to accept inequalities in power and status as natural. The prevailing attitude is that some individuals will have more power and influence than others, just as some people are taller than others. Those with power emphasize their status and avoid delegating or sharing it. They distinguish themselves from those without power or with less power. Criticism or disagreement with those in authority by subordinates is viewed as undesirable. The powerful are also expected to accept the responsibilities that go with power, including looking after those beneath them. Subordinates are not encouraged to take initiative and are closely supervised.

In a high power distance society, obedience to and respect for elders are essential. Family ties are close, and parents encourage dependence on the family throughout life. In school, students show great deference to teachers, often standing up when the teacher enters the room. Teachers deliver information and students receive that information unquestioningly. Students speak only when spoken to, and expect to receive knowledge from the teacher. In the workplace, power is centralized, and the organization is very hierarchical. Special privileges for the boss are accepted and expected, and wide salary gaps are common.[60]

The power distance values exhibited in the family, at school, and in the workplace are also reflected in the relationship between government and its citizens. High power distance cultures tend to have more autocratic forms of government, where connections are critical and unequal distribution of wealth and power are common. Low power distance countries tend to have more democratic governments where leaders stress equal rights and minimize differences in status among individuals. Status is based on ability and expertise rather than connection,

57. Hofstede uses both "low" to "high" and "small" to "large" in his discussions of power distance. I have chosen to use the low-high dichotomy.

58. HOFSTEDE, SOFTWARE, *supra* note 11, at 28.

59. *Id.* at 35-37.

60. *Id.* at 35.

wealth, or ability to use force. Those countries ranked as having the highest power distance are Malaysia and Guatemala.[61] Austria and Israel are countries with very low power distance.[62] The United States falls near the middle of the power distance continuum, but closer to the low end.[63]

5. Uncertainty avoidance.[64] A fifth dimension is uncertainty avoidance—the degree of comfort with the unknown or unpredictable.[65] This dimension was one of the four dimensions identified by Hofstede in a study of IBM employees. He defined it as "the extent to which the members of a culture feel threatened by uncertain or unknown situations."[66] "This feeling is, among other things, expressed through nervous stress and a need for predictability: a need for written and unwritten rules."[67] As Hofstede wrote, "[e]xtreme uncertainty creates intolerable anxiety."[68] One of the ways that society alleviates this anxiety is developing laws, which govern the behavior of others, and decrease uncertainty.[69]

Uncertainty avoidance is measured from low to high.[70] In a society low on this dimension anxiety levels are relatively low. Showing emotion or aggression is frowned upon, and those who behave emotionally are viewed negatively. Hofstede describes the affect of these cultures as "quiet, easy-going, indolent, controlled, lazy."[71] Ambiguity is not cause for concern. Experimenting is viewed as necessary to learn and improve. People view what is different as interesting, and tradition is not valued for its own sake. The "way we have always done things" is not seen as the best way and new ideas are encouraged. Rules or norms are informal and allow for a wide range of personal interpretation in application. Formal rules are established only when necessary, but once established they are respected. People are tolerant and not threatened by deviant ideas. Conflict is viewed as potentially positive.[72] Initiative and flexibility are valued and structure is avoided. People in low uncertainty avoidance cultures tend to be tolerant of differences, and children are expected to treat everyone the same way.[73] Also, citizens in low uncertainty avoidance cultures tend to have more trust in government and the legal system, and to participate in even the lowest level of government.[74] Singapore, Jamaica, Denmark and Sweden are countries with low uncer-

61. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 87. Hofstede assigns 50 countries and three regions a rank and a "power distance index" (PDI). *Id.* Malaysia has the highest power distance and therefore a rank of 1 and PDI of 104, while Guatamala and Panama are tied for rank 2/3 with PDIs of 95. *Id. See also* HOFSTEDE, SOFTWARE, *supra* note 11, at 32-40.

62. Austria was ranked 53 and Israel 52, with PDIs of 11 and 13, respectively. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 87.

63. The United States is ranked 38 out of 53 and has a PDI of 40. *Id.*

64. The term "uncertainty avoidance" is borrowed from American organization sociology. *See* RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 118 (1963).

65. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 145.

66. *Id.* at 161.

67. HOFSTEDE, SOFTWARE, *supra* note 11, at 113.

68. Hofstede notes the difference between anxiety and fear: anxiety is a "state of being uneasy or worried about what may happen," but there is no object. (Webster's New World Dictionary). Fear, on the other hand, has an object. *Id.* at 114.

69. *Id.* at 110.

70. Hofstede also refers to the two extremes of the dimension as weak and strong. *Id.* at 111.

71. *Id.* at 115.

72. TING-TOOMEY, *supra* note 13, at 71-72.

73. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 174.

74. *Id.* at 127.

tainty avoidance. The United States falls closer to the low uncertainty avoidance end of the scale, but is not at the extreme end.[75]

People in high uncertainty avoidance cultures are more expressive. Hofstede describes the affect of people in these cultures as "busy, fidgety, emotional, aggressive, active."[76] Talking loudly accompanied by gesturing is common. Showing aggression or emotions at the proper time and place is viewed as acceptable. Conflict and change are viewed as threatening.[77] People believe there is a good reason for "the way we do things around here," and structure is valued. Tradition, rules and laws are respected and followed, and provide predictability and guidance for how to handle every possible situation.[78] Students seek the "right answer" and teachers are expected to know the "right answer." [79]

Where uncertainty avoidance is high, ambiguity creates stress, so structure and predictability are important. When the status quo is disrupted, people experience a high level of anxiety and stress and tend to be more expressive, showing emotion readily. These cultures tend to be less accepting of differences because people believe that what is different may be dangerous. High uncertainty avoidance cultures tend to have more formal "rules, planning, regulations, rituals and ceremonies, which add structure to life."[80] Greece, Portugal, Guatemala and Japan are at the extreme end of the high uncertainty avoidance continuum.[81]

6. Locus of control. Locus of control, measured from internal to external, refers to the extent to which people believe that they control their fate.[82] Individuals with an internal locus of control believe that they control their own destinies. These people believe that most things can be changed, and that there are no limits to what one can do or become. Anything one sets one's mind to can be achieved. One is responsible for what happens to oneself. The United States culture reflects a strong internal locus of control, along with Uruguay, Israel and Norway.[83]

At the other end of the continuum, people with an external locus of control believe that some things in life are predetermined. Fate, destiny and acceptance are part of life. They believe that success is a combination of good fortune and one's effort. Life is what happens to you. Venezuela, China and Nepal are countries with a very external locus of control.[84]

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75. United States ranks 43rd out of 53 countries and regions. *Id.* at 151.

76. HOFSTEDE, SOFTWARE, *supra* note 11, at 115.

77. TING-TOOMEY, *supra* note 13, at 72.

78. Germany, a high uncertainty avoidance culture, for example, has a law, "*Notstandsgesetze*," to apply in the event that all other laws become unenforceable. Great Britain, a low uncertainty avoidance culture, on the other hand, has no written constitution. HOFSTEDE, SOFTWARE, *supra* note 11, at 126.

79. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 169.

80. SAMOVAR. CULTURES, *supra* note 30, at 64.

81. HOFSTEDE, CONSEQUENCES, *supra* note 34, at 151.

82. Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement, in* 80 PSYCHOLOGICAL MONOGRAPHS: GENERAL AND APPLIED 1 (1966); STORTI, *supra* note 13, at 66-70; TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 145.

83. STORTI, FOREIGNERS, *supra* note 34, at 82; TROMPENAARS & HAMPDEN-TURNER, *supra* note 9 at 148.

84. TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 148.

C. Dominant American Cultural Values

American dominant culture[85] exhibits the following cultural values: extreme individualism, universalism, low-context communication and monochronic time sense, power distance in a range of medium to low, fairly low uncertainty avoidance and internal locus of control. The factor that exerts the strongest influence on American culture is individualism,[86] and the related value of universalism. How do these cultural values play out in the three primary dispute resolution practices that have evolved in the United States: litigation, arbitration and mediation?

II. DOMINANT AMERICAN CULTURAL VALUES AND HOW THEY ARE REFLECTED IN DISPUTING PROCESSES

A. Litigation

Adversarial litigation,[87] the primary American dispute resolution mechanism, exemplifies most, but not all, of the dominant American cultural values. While today litigation is the default American dispute resolution process,[88] this has not always been so. As Jerold Auerbach writes in *Justice Without Law?*, the earliest settlers in seventeenth century colonial New England lived in tight communal units and eschewed lawyers and courts. Disputes were either suppressed in favor of community harmony or settled by the least disruptive means, such as mediation.[89] Strong ethnic, religious or commercial interests led the colonists to create their own dispute resolution mechanisms, including informal mediation and arbitration, that reflected strong communitarian values and group harmony.[90]

Eventually, however, as the population grew, land became more scarce, and communities became more diverse. Legalism and courts emerged as individuals sought to enforce private claims at the expense of community harmony.[91] This early shift from collectivist values to more individualist values has endured to the

85. American dominant culture refers to the majority of middle class people in the United States, or "mainstream Americans." Even though there are many exceptions and variations, Americans "do share a value system." J.M. CHARON, THE MEANING OF SOCIOLOGY 99 (6th ed. 1999).

86. SAMOVAR, CULTURES, *supra* note 30, at 54.

87. I use "litigation" to refer to public adjudication within the formal legal system in which participation is not voluntary. While arbitration and mediation have become legalized in many ways, they are still viewed as informal "alternatives" to the formal legal system. Admittedly, settlement, not trial or adjudication, is by far the most likely conclusion of the litigation process.

88. The United States is the most litigious society in the world. AUERBACH, *supra* note 1, at 3. *See also* JAMES ROBERT FORCIER, JUDICIAL EXCESS 1-8 (1994); PATRICK M. GARRY, A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA (1997); ROBERT A. KAGAN, ADVERSARIAL LEGALISM 3-4 (2001).

89. AUERBACH, *supra* note 1, at 19-20.

90. From an historical perspective, there has been a pattern of informal legal processes followed by legalization, then back to informal approaches. Legal anthropologist Sally Engle Merry cites the juvenile court system as an example. The juvenile court system, originally instituted as a reform to stress treatment and rehabilitation evolved into a more traditional formal, legalistic forum after critics argued that the legal rights of juveniles were not adequately protected. Sally Engle Merry, *Disputing Without Culture,* 100 HARV. L. REV. 2057, 2067-68 (1987) (book review).

91. AUERBACH, *supra* note 1, at 34-35. For example, as land became less plentiful, disputes over ownership rights became more common. *Id.* at 35.

present, defining the preferred American way of resolving disputes. As Auerbach states, "[a]rbitration and mediation had been appropriate for neighbors and parishioners, but the disagreements of strangers, who lacked any basis for mutual trust, were for lawyers and judges to resolve."[92]

Litigation, exemplifying the formal American system of justice, is now institutionalized at state and federal levels. Litigation emphasizes an adversarial approach.[93] It is designed to identify an individual's grievance, assert a formal claim against the perceived responsible party, and seek redress.[94] Litigation is based on assumptions of right and wrong, entitlement, blame, and fault-finding.

While not all disputants involve lawyers in making their claims, lawyers and judges have been instrumental in shaping and conducting litigation. Litigation reflects the lawyer's "standard philosophical map."[95] This map is based on two assumptions: 1) that disputants are adversaries, and 2) that disputes "may be resolved through the application, by a third party, of some general rule of law."[96] Following these assumptions, lawyers develop substantive legal theories that convert claims into articulable legal rights that are entitled to a remedy[97] enforceable by a court of law. They are schooled in intricate procedural rules governing how claims should be framed, how pre-trial discovery may be conducted, and what evidence may be admitted—all designed to ensure fair trials. The entire process relies on lawyers and judges, with their special expertise and training. Safeguards such as appellate review exist to ensure that procedural and substantive rules are followed.

The average person may assume that filing a legal claim leads to resolution in a courtroom, complete with a judge and jury. However, very few civil cases are decided by trials. In fact, more than 98 percent of civil cases in federal courts are settled prior to trial.[98] Many of these cases that settle do so only days before trial, after extensive pre-trial discovery and the disposition of multiple motions.[99] The pre-trial settlement process operates in the "shadow of the law,"[100] guided by the likely court outcome.

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92. *Id.* at 35 (citing DAVID G. ALLEN, IN ENGLISH WAYS 237-41 (1981))

93. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture,* 15 LAW & SOC'Y REV. 525, 526 (1980-81).

94. *Id.* at 527.

95. Leonard L. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L. J. 29, 43-44 (1982).

96. *Id.* at 44. Research confirms that most lawyers have an adversarial perspective. *See* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering,* 6 HARV. NEGOT. L. REV. 145, 160-61 (2001).

97. One of the shortcomings of litigation is that courts are limited in what remedies are available to them. Typically, courts can award money, order the transfer of goods or property, or issue injunctions.

98. *See* Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean,* 10 No. 4 DISP. RES. MAG. 3 (2004) (explaining that in federal district courts 1.8% of dispositions are by trial); Folberg et al., *Use of ADR in California Courts: Findings & Proposals,* 26 U.S.F. L. REV. 343, 357 (1992). In twenty-one state trial courts that provided data to the National Center for State Courts, an average of eight percent of civil cases were disposed of by trial. EXAMINING THE WORK OF STATE COURTS 2003 22 (Brian J. Ostrom et al. eds., 2004).

99. Non-trial adjudication by summary judgment makes up a large percentage of cases that end before a trial. Galanter, *supra* note 98, at 4.

100. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 986-87 (1979) (explaining how divorce litigants negotiate with reference to default rules and likely legal outcomes).

Many legal scholars have written about the shortcomings of litigation: that it is costly, slow, stifles creativity and ignores certain values such as privacy, participation, emotional catharsis and community.[101] Litigation, however, continues to be the most common avenue to address grievances. I assert that this is because litigation reflects certain key values consistent with dominant American culture. In the early 1980s, legal anthropologists Sally Merry and Susan Silbey conducted research into the reasons that citizens do not voluntarily use alternatives to litigation such as mediation more often. They concluded that by the time a conflict has reached the stage at which outsider intervention is warranted, the grievant has goals that typically cannot be achieved in mediation: vindication, protection of rights, an advocate to fight for them, and a declaration that they are right and the other person is wrong.[102] These goals of litigation reflect cultural values consistent with dominant American culture.

Litigation exhibits values consistent with the extreme individualism of dominant American culture, including the related values of universalism and low-context, monochronic communication. Conversely, litigation differs from dominant American culture in three important dimensions: power distance, uncertainty avoidance, and locus of control. I argue that the search for less formal processes that allow disputants to have more control and voice, such as arbitration and mediation, are driven by these differences and that these other values contribute to the persistence of alternative dispute resolution, and especially community/facilitative mediation.

1. Individualism. Litigation frames a dispute in adversarial terms: the enforcement of an individual or group's rights in opposition to the rights of another individual or group—a highly individualistic perspective. An individual seeking vindication in court has ranked group harmony as less important than assertion of his or her individual goals. Litigants do not typically consider the rights or needs of the opposing side, except to anticipate arguments in order to make better counterarguments.[103] The litigation goals of vindication and protection of rights identified by Merry and Silbey reflect strong individualism.

2. Universalism. Litigation reflects universalist values—the rules apply, regardless who is involved. The arguments made in litigation are based on established principles of law. Precedent requires that a rule of law be applied in similarly situated cases. Judges and juries are screened for conflicts of interest or prior knowledge of a litigant or the case. Jurors are instructed to put prior knowledge aside and make decisions entirely on evidence deemed admissible and produced in

101. *See, e.g.,* Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World,* 38 WM. & MARY L. REV. 5 (1996); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases),* 83 GEO. L.J. 2663 (1995).

102. Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute,* 9 JUST. SYS. J. 151, 153 (1984).

103. For example, in a study by Michele J. Gelfand and Sophia Christakopoulou, American participants were paired with Greek participants to conduct a negotiation via email over a two-week period. The study showed that the American (individualist) participants "claimed more value to themselves throughout the negotiation, learned less about the priorities of their counterparts, and engaged in behaviors to enhance their own status in comparison to their Greek counterparts." Michele J.Gelfand & Sophia Christakopoulou, *Culture and Negotiator Cognition: Judgment Accuracy and Negotiation Processes in Individualistic and Collectivistic Cultures,* 79 ORG. BEHAV. & HUM. DECISION PROC. 248, 263 (1999).

court. The expectation that the judge or jury will determine the "truth" and declare one party right and the other wrong reflects the universalist belief that a "right" and a "wrong" exist in any given situation.

3. Communication Patterns: Low-context and Monochronic. The detailed and intricate nature of court procedures and trial presentation reflect a very low-context style of communication. Lawyers make opening statements and closing arguments explaining the case history, summarizing the facts, and articulating why their side should prevail, followed by lengthy briefs articulating their legal claims. Nothing is left to guesswork or implication from context if possible. No good trial lawyer would expect a judge or jury to read between the lines or guess the meaning or the importance of a document or witness' testimony from the surrounding context.

The emphasis in litigation on case schedules, time limits and efficiency is indicative of a monochronic sense of time: "time is money." Lawyers often bill by the hour, and court administrators and judges schedule trials months in advance. Court begins at a certain time and typically ends at a certain time—all examples of a monochronic time sense.

4. High Power Distance. While American culture falls along the low to mid-range of the power distance continuum, litigation reflects high power distance values. Judges dress in formal black robes and even sit higher than the litigants behind a bench or podium. The judge is vested with the power to decide what claims are viable, what information will be admitted during a trial (the rules of evidence), what law will apply, and in bench trials, who is right and who is wrong. In court, litigants and their lawyers address the judge with honorifics such as "your honor" and last names are used. The complexity of court procedures leads most litigants to surrender their own voice to an agent—their attorney—distancing themselves even further from the authority.[104]

5. High Uncertainty Avoidance. While the willingness to address conflict directly and to have trust in the legal system are indicative of low uncertainty avoidance, litigation also reflects characteristics of high uncertainty avoidance. The law is (or claims to be)[105] consistent and predictable.[106] Detailed rules govern the litigation process. Judges make decisions based on precedent. Lawyers represent their clients and shape what may begin as ambiguous grievances into legal claims. The legal system is vested with the power to find the "right answer."

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104. Research by social psychologists Tyler, Lind and Huo showed that those with low power distance values react more strongly to what they perceive as unfair treatment by third parties, whereas those with high power distance values tend to accept a decision by a higher authority more readily. Tyler, *supra* note 20, at 1148-49. The converse is that in a higher power distance culture, satisfaction with dispute resolution processes is likely to correlate more with the participant's perception of the favorability of the outcome rather than how one was treated. *Id.*

105. This question, of course, implicates broad jurisprudential debates among critical legal scholars and others concerning the indeterminacy of legal doctrine and whether "correct" answers can be found to legal questions that are beyond the scope of this article.

106. Those experienced with litigation might say it is in fact very risky and unpredictable, and should be avoided by those with high uncertainty avoidance. Research by psychologists, however, indicates that litigants tend to assess the likely success of their claim in a self-interested manner due to perspective biases. Those biases also lead to exaggerated perceptions of personal control, sometimes called "optimistic overconfidence." Optimistic overconfidence leads litigants to search for information that buttresses their assessment and to ignore information that weakens it. Richard Birke & Craig R. Fox, *Psychological Principles In Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999).

The search for the predictable and the structured environment of litigation are characteristics of high uncertainty avoidance, whereas dominant United States culture reflects a fairly low uncertainty avoidance.

6. External Locus of Control. Litigation exhibits an external locus of control, as opposed to dominant American culture, which exemplifies an internal locus of control. In court, litigants usually cede the task of advocating for themselves to lawyers. The grievant's story about how she was wronged is transmuted into a recognized legal claim, often using words that the litigant does not know or even understand. The determination of rights is given over to a judge and/or jury. The assumption is that the lawyer and judge will know what is best and right.

B. Arbitration

Arbitration in many respects is less formal than litigation, and traditionally embodies values not found in litigation.[107] The tradition of bringing disputes to a respected community elder for decision goes back thousands of years, and is still practiced in many societies.[108] While the arbitrator is vested with the power to make a binding decision on the outcome of the case, the parties in arbitration typically reserve the right to select the arbitrator and to customize the proceeding.

Commercial arbitration has roots in medieval Europe, where guilds of craftsmen used fellow merchants to decide disputes efficiently within their own group.[109] Merchants in seventeenth century America chose commercial arbitration over courts to retain control of procedure and to craft rules for decision that reflected their particular areas of commerce. Selection of the neutral allowed them to use arbitrators who would be able to make decisions with an understanding of the reality of a particular business setting.[110]

Arbitration is traditionally contractual: the parties to a dispute voluntarily agree, either in advance or at the time a dispute arises, to submit the matter to an impartial third person for a decision based on the evidence and arguments presented. The parties agree in advance to accept the arbitrator's decision as final and binding upon them.[111] Unlike a judicial proceeding, the disputants select the neutral decision-maker and define the procedural rules. The arbitrator is not necessarily a lawyer, but may be an expert in the matter under consideration, or a trusted person in the community. Historically some trade associations excluded lawyers from arbitration proceedings, but today the right to have a lawyer, at least

107. There are many variations in the arbitration process. It is used primarily in labor, international, and commercial disputes. More recently, it has expanded to securities, employment, and consumer disputes. It may be binding or nonbinding, and voluntary or mandatory. For purposes of this article, I will primarily focus on binding, voluntary arbitration in domestic disputes.

108. *See* JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (1929); Daniel E. Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 ARB. J. 193, 194-95 (1961). For example, Native American tribes have traditionally used elders to resolve disputes within their communities.

109. JEROME T. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION 16-17 (2004).

110. AUERBACH, *supra* note 1, at 32-33.

111. MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION 1-2 (2002).

in commercial arbitration, is protected.[112] Arbitrators are not generally required to follow established principles of substantive law or rules of evidence, nor do they have to give reasons for their decisions.[113] The parties may determine in advance the extent to which precedent should be followed or established., and arbitral decisions are final and binding. There is no right to appeal an arbitral award, and grounds for vacating an award are extremely limited.[114]

Until the late 1980s, when mediation began to increase in popularity, arbitration and judicial settlement conferences were the most widely used alternative dispute resolution (ADR) processes.[115] Arbitration grew as an alternative to litigation for a number of reasons: speedier resolution, less costly, limited discovery, informal proceedings, privacy, the choice of a decision-maker who understands the dispute, limited rights of appeal, and avoiding a legal precedent. Federal and state laws sanction and encourage its use, and courts endorse it.[116]

Arbitration retains some litigation values, such as external locus of control and monochronic time sense. Arbitration shifts in relation to two cultural values as compared to litigation: collectivism and particularism. Arbitration also exhibits a lower power distance, lower uncertainty avoidance, and a slightly less external locus of control than litigation.

1. Individualism-Collectivism and Communication. Arbitration retains aspects of the individualist values present in litigation: the issues are framed in an adversarial manner, and protection of individual rights is a primary goal. Arbitration has the capacity, however, to honor collectivist values, in that the parties may choose an arbitrator familiar with their industry who will acknowledge and protect future relationships. Labor arbitration also emphasizes the importance of preserving industrial peace,[117] and labor arbitrators are likely to take collectivist values into account when making their decisions. Arbitration also shares a low-context, monochronic style of communication with litigation, as the parties present their cases in a detailed fashion and linear manner, but the process is less formal.

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112. DOMKE, *supra* note 111, § 24.04 at 8. *See also* Sartiano v. Becker, 501 N.Y.S.2d 94, 95 (N.Y. App. Div. 1986); Natasi v. Artenberg, 130 A.D.2d 469, 515 N.Y.S.2d 52 (N.Y. App. Div. 1987); Marino v. Tagaris, 480 N.E.2d 286 (Mass. 1985).

113. DOMKE, *supra* note 111, at 2.

114. A federal district court may order a vacatur of an arbitral award if the arbitral proceedings were fundamentally unfair or corrupt under the limited grounds stated in § 10 of the United States Arbitration Act (commonly known as the Federal Arbitration Act or FAA). 9 U.S.C. § 10 (2000). No federal statute allows judicial review of the merits of an arbitrated case, and federal decisional law supports a very narrow reading of the procedural grounds for vacatur in FAA § 10. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 80-82 (2004).

115. *See* LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 28 (2d ed. 1994); Deborah Hensler, *Court-Annexed ADR*, *in* DONOVAN LEISURE NEWTON & IRVINE, ADR PRACTICE BOOK § 19.3, 352 (John H. Wilkinson ed., 1990).

116. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. § 1-14 (2000); Revised Unif. Arbitration Act § 1, 33. (2000). *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (upholding agreement to arbitrate employee's employment discrimination action); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding agreement to arbitrate a financial services employee's age discrimination claim); Rodriguez De Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1987) (upholding agreement to arbitrate an investor's 1933 Securities Act fraud claims); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (upholding agreement to arbitrate an investor's RICO and 1934 Securities Exchange Act fraud claims).

117. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

2. More Particularist. On the universalist-particularist value dimension, arbitration departs from litigation. The ability to draft a contract—and essentially design the process—represents more particularist values than litigation does. Disputants retain the ability to select their decision-maker and the rules they will follow during the proceeding. They may even determine the rules by which the dispute will be decided.

3. Lower Power Distance & Uncertainty Avoidance. Since arbitrators are usually chosen by the parties, the process is less hierarchical—a lower power distance than litigation. The hearing is less formal, with less attention to rules, representing lower uncertainty avoidance, which is more consistent with dominant American cultural values.

4. More Internal Locus of Control. The locus of control in arbitration is slightly more internal than in litigation, even though the arbitrator makes a decision. Because the parties have a say in choosing the arbitrator, the procedural rules, and possibly even the norms or laws that will determine the case, the locus of control is more internal, which is also more consistent with dominant American cultural values.

More recently, however, arbitration, which developed outside of the formal legal system as a cheaper and quicker alternative, has become increasingly formalistic and legalistic. Many commentators observe that it has become a cumbersome and expensive process that lacks the benefits of litigation: a reasoned opinion, automatic enforceability of final decisions, and the right to appeal a decision.[118] In commercial arbitration, for example, as lawyers have become more involved, arbitration can be just as costly and time-consuming as the trial alternative. The bigger the case, and the higher the stakes, the more likely it is that arbitration will mirror the litigation alternative. The formalization or judicialization of arbitration may be partially in response to court scrutiny of the process as it has expanded into arenas where the parties are not on an equal footing, such as employment and consumer contracts.[119] I argue that the shift is also due to the influence of dominant American values associated with litigation: individualism and universalism, as well as the litigation values of external locus of control and high power distance.

For example, in commercial arbitration, as the marketplace has grown, disputants are less likely to personally know the principals on the other side of a dispute. There are fewer community affiliations or personal relationships at stake. When disputes are handed over to lawyers, the business interests and personal relationship interests of two merchants or businesses become secondary to the vindication of legal rights. Individual or corporate rights take precedence over broader concerns such as future business relationships. This shift in focus from personal relationships to legal rights is representative of individualistic values.

Arbitration has also become more universalist, and less tailored to the particular parties and dispute. In this way, arbitration often imitates traditional litigation,

118. *See, e.g.,* Alain Frécon, *Delaying Tactics in Arbitration,* 59-JAN DISP. RESOL. J. 40 (2005); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration,* 53-APR DISP. RESOL. J. 37 (2003); Perry A. Zirkel & Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?,* 16 OHIO. ST. J. ON DISP. RESOL. 243 (2001).

119. *See* Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field,* 3 PEPP. DISP. L. J. 111, 119-20 (2002).

with more formal procedures such as discovery, motions practice, submission of briefs and written awards.

Finally, the locus of control in arbitration has shifted to become more external, as in litigation, because the dispute is no longer handled by the principals themselves but is dominated by lawyers. Arbitration has also shifted toward a higher power distance, as the process has become more like court, with the arbitrator less likely to know the principals.

C. Mediation

Less formal than litigation or arbitration, mediation is facilitated negotiation: the intervention into a dispute by an acceptable, impartial third party who has no authoritative decision-making power. Settlement in mediation is voluntary; the mediator assists the disputing parties to reach their own mutually acceptable resolution.

Much like arbitration, mediation has existed for thousands of years. It was used in traditional and indigenous societies in China, Japan, Africa, and the Americas and continues to be used in many rural societies.[120] The modern mediation movement in the United States traces its roots to many sources: labor/management dispute resolution;[121] neighborhood "reconciliation boards" created in the 1960s and supported by the federal Office of Economic Opportunity;[122] the involvement of religious groups, particularly the Quakers and the Mennonites, in peace-making, both domestically and internationally; [123] the creation by Congress of the Community Relations Service to address civil rights unrest in 1964;[124] and the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference),[125] when leading judges, lawyers and academics met to discuss and strategize a "better way" to improve the overloaded court system.[126]

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120. BARRETT, *supra* note 109, at 6, 20-21; JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-7 (1984).

121. The Federal Mediation and Conciliation Service (FMCS) was established after World War II, to facilitate mediation and arbitration of labor/management disputes.

122. AUERBACH, *supra* note 1, at 116. The Office of Economic Opportunity supported the development of community dispute resolution centers.

123. Avruch, *supra* note 7, at 19, 25-28.

124. Anthropologist Laura Nader argues that the emergence of ADR during times of civil unrest represents the state's promotion of a harmony model (i.e., alternatives to courts) as a way of social control or controlling conflict. *Id.* at 41, 43-44.

125. The conference was named after Dean Roscoe Pound, whose 1906 speech, "The Causes of Popular Dissatisfaction with the Administration of Justice" addressed concerns about the need for reform of the legal system and courts. Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation,* 5 NEV. L.J. 399-401, 422-24 (2004/2005). Although his ideas were not seriously pursued during his time, the need for reforms in the legal system was addressed at the 1976 conference. *Id.* The goals of the 1976 Pound conference included addressing the questions: "(1) what types of disputes can best be resolved by judicial action and what alternatives are superior? and (2) how can we serve the interests of justice with processes that are more speedy and less expensive?" *Id.*

126. A resulting task force recommended the use of arbitration and mediation as alternatives to traditional litigation. Laura Nader and others have critiqued the movement, claiming that "garbage cases" and disadvantaged citizens were being sent to alternative forums, while "important" cases were re-

As the use of mediation has increased in the United States over the last three decades, growth has occurred primarily in two contexts: community-based mediation programs and their successors, including family mediation; and court-annexed mediation programs.[127] These two contexts have given rise to two very different and distinct styles of mediation: community mediation is characterized by a style called "facilitative;" and court-annexed mediation is characterized by a style called "evaluative."[128] The following sections discuss each mediation style in turn.

1. Community mediation

Community mediation can trace its roots, at least partially, to the creation of Neighborhood Justice Centers in 1971.[129] Over the next two decades, community dispute resolution centers opened in towns and cities across the United States. The founders of these centers were influenced by a growing dissatisfaction with the formal justice system, and a desire to address conflict at the community level. The training and empowerment of community volunteers was also a motivation. Today, over 550 community mediation centers across the United States train community volunteers to mediate neighbor, landlord-tenant, family, juvenile and school, victim/offender, and workplace disputes—often for free or very low-

served for courts. *See* AUERBACH, *supra* note 1, at 124-25; John Honnold, THE LIFE OF THE LAW, 48-49 (1964); Avruch, *supra* note 7, at 43-44.

127. A distinct line cannot be drawn between these two contexts, because variations exist. However, for purposes of this discussion I will divide the world of mediation into these two camps. The terms "court-annexed mediation" and "court-connected mediation" refer to programs operated by courts, as well as private mediation that operates in the shadow of the courts. I include family mediation with the community-based programs even though much family mediation occurs in a court context because it is more congruent philosophically with community mediation.

128. The terms "facilitative" and "evaluative" come from a 1994 article by Leonard Riskin. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALT. TO THE HIGH COST OF LITIG. 111, 111-14 (1994) [hereinafter Riskin, *Mediator Orientations*]. Riskin divided the world of mediation into four quadrants, or grids, based on problem definition—whether the mediator views the problem narrowly (legal issues primarily) or broadly (beyond legal issues to include other relational interests; and the mediator's role—how the mediator behaves in relation to the parties: whether the mediator provides direction regarding appropriate grounds for settlement, which he called evaluative or whether the mediator refrains from giving any opinion, which he termed facilitative). *Id.*; *see also* Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (expanding the above referenced discussion in a longer article). More recently Riskin has revised his grid and renamed some of the categories. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003). The mediation field has long been engaged in a debate concerning what "real" mediation is and why mediation needs a modifier, like evaluative or facilitative. Writers have used different terms to describe the range of mediator practices, from facilitative to evaluative, directive to non-directive, therapeutic to trashing and bashing. I will use the evaluative-facilitative terms here. *See, e.g.*, James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997).

129. The Pound Conference Follow-Up Task Force started a pilot project in Columbus, Ohio in 1971, a night prosecutor program in which interpersonal disputes and minor criminal charges were referred to mediation. Neighborhood Justice Centers in Atlanta, Kansas City and Los Angeles followed in 1978, sponsored by the Department of Justice. The Association of Family and Conciliation Court (AFCC) was founded even earlier, in 1963, to promote court-connected family mediation.

cost.[130] Concurrent with community mediation centers, the use of mediation in family disputes grew, particularly for child custody and visitation matters. In both of these areas, the mediators came from a variety of backgrounds, including law.

The community mediation movement was based on certain assumptions and underlying values that influenced how mediators were trained and, consequently, how they mediated.[131] The most important assumption was that the parties should retain control of the outcome of their dispute, often called "party self-determination."[132] Party self-determination equates to a strong internal locus of control.

A defining characteristic of community mediation is the belief that mediation is an opportunity for disputants to look at their conflict more broadly than litigation typically allows. Mediators are trained to help parties seek solutions that maximize interest satisfaction for both sides. To facilitate this, mediators help parties explore their needs or interests, rather than focus on their stated positions and legal rights.[133] All of these concepts are grounded in the theory of integrative or interest-based negotiation, and depart from the highly individualistic, adversarial approach found in litigation.[134]

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130. National Association for Community Mediation, *Overview of Community Mediation, available at* http://www.nafcm.org/pg5.cfm (Last visited Nov. 7, 2005).

131. Assumptions are those beliefs that are so embedded in our thinking process that we feel they need no explanation. It has been said we know something is a basic assumption when questioning it leads to annoyance on the part of the holder. For example, an American who is asked why we value freedom or why we all should have equal opportunity would have difficulty explaining why. These beliefs are so much a part of our embedded value systems that we do not stop to think why we believe them, we just feel they are true. As Daryl Bem wrote, assumptions (which he calls "our most fundamental primitive beliefs") are "so taken for granted that we are apt not to notice that we hold them at all; we remain unaware of them until they are called to our attention or are brought into question by some bizarre circumstance in which they appear to be violated." DARYL J. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 5 (1970).

132. Party self-determination is the first principle in a widely accepted set of mediator ethical standards. *See* Model Standards of Conduct for Mediators Standard I (Joint Committee of Delegates from American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution 1994) [hereinafter *Model Standards*], *available at* http://www.abanet.org/dispute/models tandardsofconduct.doc (last visited Nov. 7, 2005).

133. "Interests" refers to the underlying reasons why people take positions in negotiation, and may be substantive, procedural and psychological. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 27, 37 (1986). Substantive interests are usually tangible items, such as money, a promotion, or the return of property. Procedural interests refer to how the negotiation is handled: Do the parties speak for themselves, or through agents? Does the process feel fair? How much time is allotted to each speaker? Does each participant feel included and heard? Is the settlement implemented in a timely fashion? Psychological interests are the emotional and relational needs that motivate the negotiators. Psychological interests can include a need to be treated with respect, to be acknowledged for a contribution, or to feel safe and secure.

Many mediators have learned about Maslow's hierarchy of human needs, either in mediation training or other contexts, as a way of helping parties understand underlying interests and needs driving conflicts. The model orders human needs from lower to higher as physiological, safety, belongingness, self-esteem, and finally self-actualization at the top. *See* ABRAHAM H. MASLOW, MOTIVATION & PERSONALITY (1954). As Hofstede notes, the placement of self-actualization at the top of the pyramid is an example of an individualistic cultural outlook. HOFSTEDE, SOFTWARE, *supra* note 11, at 73-74; HOFSTEDE, CONSEQUENCES, *supra* note 34, at 18. The order of Maslow's hierarchy is informed by American culture in other ways as well. For example, safety would be more highly valued in a culture with higher uncertainty avoidance. HOFSTEDE, SOFTWARE, *supra* note 11, at 125.

134. One of the earliest to write about integrative bargaining was Mary Parker Follett. *See* Mary Parker Follett, *Constructive Conflict, in* MARY PARKER FOLLETT—PROPHET OF MANAGEMENT: A

Mediation as practiced in the community context uses a broad, facilitative style,[135] meaning that the mediator is trained to guide the parties through the process, without being highly directive, and to encourage the participants to look broadly at the problem, not just the legal issues. The typical training recommends a linear dispute resolution process that consists of five to twelve steps.[136] Many programs encourage mediators to keep the parties in joint sessions to negotiate whenever possible, to increase opportunities for understanding each other's interests and improving the relationship. Trainers emphasize self-determination, often reminding mediators that the agreement "belongs to the parties," and the job of the mediator is to assist with process only. Mediators are taught to use caucuses, or private meetings as appropriate, and to guide the discussion, asking questions to uncover underlying interests, especially psychological interests relating to the relationship between the parties. Mediators are discouraged from proposing options or giving evaluative judgments about strengths and weaknesses of a case and encouraged to use "reality testing" to move parties toward more realistic settlement offers. Mediators try to help the parties seek mutual gain through exploration of overlapping or potentially integrative interests and needs. Attorneys are sometimes present in these mediations, but the mediator encourages the parties to speak for themselves even when attorneys are present.

In the mid-1990s, another style of mediation emerged from the community context, called "transformative mediation." Transformative mediation is the most facilitative of the facilitative mediation styles. As Baruch Bush, a founder of the movement describes it, "a mediator's job is to facilitate a conversation without a predetermined end, not to facilitate the resolution of a dispute per se. Therefore, the mediator offers no advice or substantive direction as to content or process."[137]

Mediation departs from litigation values, varying on every dimension. Mediation accommodates more collectivist, particularist values, and high-context, polychronic communication. Mediation also honors three dominant American cultural values not present in litigation or arbitration: strong internal locus of control, low power distance and low uncertainty avoidance. I argue that commu-

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CELEBRATION OF WRITINGS FROM THE 1920S 67 (Pauline Graham ed., 1995). *See also* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES (2d ed. 1991); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR (1986).

135. *See* Riskin, *Mediator Orientations, supra* note 128, at 113. Again, community mediation is not monolithic, but by far the majority of these programs encourage a broad facilitative approach. *Id.*

136. The typical steps include a mediator's opening statement, statements from each side about the matter in dispute, identification of issues, negotiation and agreement/closing. Many mediation trainers and academics that study and teach mediation today were trained in the community mediation context.

137. Bush, *supra* note 119, at 112 n.4. Transformative mediation is founded on the belief that conflict leaves people feeling weak and self-absorbed, and mediation is an opportunity to help parties change the quality of their conflict interaction. The goal is to support parties as they move from weakness to strength, becoming more responsive to each other as a result. These shifts are called empowerment and recognition. Empowerment refers to the opportunity in mediation for each disputing party to clarify their goals and better understand the resources and options available to them. The belief is that once the parties understand their own goals and options more fully, they will be empowered to make better decisions for themselves. Recognition refers to the possibility that once a party feels empowered, she will be more willing to consider the perspective and experience of the other disputant in addition to her own experience. Recognition is a choice that the parties make for themselves.
The transformative mediation movement was spurred with the publication of THE PROMISE OF MEDIATION in 1994. ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994).

nity/facilitative mediation's variance from litigation values is why mediation will remain a true alternative to litigation, one that appeals to the segment of American culture with more collectivist, particularist values, and to those for whom an internal locus of control trumps individualism. I assert that these factors contribute to consumer satisfaction with mediation, which in turn contributes to high compliance with mediated agreements, as indicated by party attitudes to dispute resolution processes.[138]

a. Collectivism. Community/facilitative mediation exemplifies a substantial shift toward collectivist values from individualist values.[139] The emphasis on recognition of relational interests, the search for options to satisfy mutual needs, and the recognition of interdependence are all indicative of collectivist values.[140]

b. Particularism. Community/facilitative mediation also reflects a shift toward particularist values. Mediators encourage disputants to refer to their own norms and standards for guidance in decision-making. While parties may discuss the likely litigated outcome, they are not bound or even encouraged to follow it.[141] The process is flexible and can be adjusted to suit the preferences of the participants.

c. Flexible Communication. Community/facilitative mediation also varies from litigation and arbitration in terms of communication. With its informality and flexibility, a skilled mediator with an understanding of intercultural communication patterns may facilitate a dialogue that is either high or low-context, depending on the participants and their preferences. The opportunity in mediation for each side to have uninterrupted time to "tell their story" allows a low or high-context communicator to function comfortably. When the participants do not share communication styles, the mediator may intervene to fill gaps by asking questions, clarifying, and summarizing.

Community/facilitative mediation is also less monochronic than litigation or arbitration. In community mediation, the parties often are given unlimited time to share their perspectives, discuss the situation, and work toward a resolution or impasse. While some mediators may impose time limitations, many do not. The process itself is flexible regarding timing and pacing, and responsive to the needs of the particular disputants. For example, a culturally competent mediator may

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138. *See, e.g.*, Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 45-47 (1984) ("Our portrait of compliance and litigant satisfaction is much like that which emerges in other studies of small claims mediation, of custody mediation, and of mediation of neighborhood and interpersonal disputes. Rates of compliance and satisfaction are quite high in mediated cases and seem consistently higher than those reported in comparable adjudicated cases."); Robert A. Baruch Bush, *What Do We Need A Mediator For?: Mediation's "Value-Added" For Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

139. Transformative mediation encompasses collectivist values (the emphasis on preserving the relationship of the parties and the focus on opportunities for mutual recognition). Interestingly, the "empowerment" element in transformative mediation exemplifies individualistic values, so this movement straddles both ends of the individualism-collectivism continuum.

140. Research conducted at the Chinese University of Hong Kong suggested that collectivistic Chinese subjects preferred mediation to a greater extent than individualistic American subjects. The reason for the preference was attributed to mediation's capability of reducing animosity between the parties, and process control. Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. OF PERSONALITY & SOC. PSYCHOL. 898 (1987).

141. At least not in community mediation. In court-annexed mediation, mediators are more likely to discuss the likely court outcomes in working with the parties.

allow extended social interchange prior to beginning the mediation to build relationships, or allow a party to convey his experience through storytelling or parables that initially might appear irrelevant to the other disputant. By summarizing and restating, the mediator may be able to draw meaning from the communication that can be understood by the other side. Culturally competent mediators will allow storytelling or overlapping styles of communication that would not be tolerated in court or arbitration.

In addition to representing some of the values opposing those found in litigation, mediation also embodies dominant American cultural values not found in litigation or arbitration: strong internal locus of control, lower power distance, and low uncertainty avoidance.

d. Internal Locus of Control. Mediation is at the opposite end from litigation and arbitration on this dimension, reflecting an internal locus of control, consistent with dominant American cultural values. The defining characteristic of mediation is party self-determination. Participation in decision-making, and the opportunity to express their views are cited as key factors in party satisfaction with mediation.[142]

e. Lower Power Distance. Mediation is a more egalitarian process than litigation or arbitration. Without decision-making authority, the mediator holds less power than an arbitrator or judge.[143] The informality of the process places the mediator as one among many, working to find a resolution that satisfies all. For example, the mediator and parties will often address one another by first name.

In mediation, procedural justice may even take precedence over substantive justice.[144] Research on how people react to third-party authorities shows that in low power distance cultures, more emphasis was placed on the quality of the process and how they were treated than with the substantive outcome.[145]

f. Low Uncertainty Avoidance. Mediation is also more congruent with low uncertainty avoidance values. The informality of the process and party self-determination are in line with low uncertainty avoidance. The freedom in mediation to create norms for decision that are workable for the participants themselves rather than adhere to established precedent is also a marker of low uncertainty avoidance.

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142. Bush, *supra* note 138, at 1, 19-20. *See also* Roselle L. Wissler, *An Evaluation of the Common Pleas Court Civil Pilot Mediation Project* 46-47 (Feb. 2000) *cited in* Nancy A. Welsh, *Disputants' Decision Control In Court-Connected Mediation: A Hollow Promise Without Procedural Justice,* 2002 J. DISP. RESOL. 179, 182 n.13 (very few litigants perceived that they were significantly pressured by either the mediator or the other party to settle; ninety-one percent of the litigants also perceived that they had "somewhat" to "a great deal" of "input in determining the outcome;" twenty-eight percent of the total litigants indicated that they had "somewhat" input while thirty-four percent indicated that they had "a great deal" of input).

143. While mediators are not decision-makers, they do wield influence over process, which potentially influences outcome.

144. *See generally* Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation,* 3 NEGOT. J. 367 (1987). *See also* Michelle Hermann et al., The Metrocourt Project Final Report, Univ. N.M. Center for the Study and Resol. of Disputes (Jan. 1993) (finding that minority claimants, who seem to fare worse in mediation than in adjudication, in fact report greater satisfaction with mediation than with adjudication).

145. Tyler, *supra* note 20, at 1148.

2. Court-annexed mediation

Concurrent with the increase in popularity of mediation in the community context, courts began to encourage its use, and lawyers jumped on the mediation bandwagon.[146] In the early 1990s, court-annexed mediation programs expanded with the support of federal and state courts, agencies, and legislatures. Under the Civil Justice Reform Act of 1990, federal district courts were encouraged to set up mediation programs.[147] By the mid-1990s over half of these courts offered mediation.[148] With the passage of the Administrative Dispute Resolution Act in 1996, Congress allowed all federal agencies to use alternative dispute resolution, and appoint ADR specialists.[149] In 1998, Congress passed the Alternative Dispute Resolution Act, requiring all federal courts to establish an ADR program.[150] In agency and court contexts, mediation has evolved as the most widely used ADR process.[151] The use of mediation in court-connected cases has grown steadily in part because many courts mandate participation in some type of ADR process and mediation has proved to be the most popular choice. Many states have statutes or court rules that require mediation of some disputes, especially family matters involving children, and most have passed mediation privilege statutes to protect the confidentiality of the mediation process.[152]

While community mediation was primarily inspired by values such as building relationships and community peace and harmony, court-connected mediation grew in response to the call by judges, court administrators and lawyers for efficiency and economy in the legal system.[153] In court-connected mediation,[154] as in pre-trial settlement negotiation, the parties negotiate in the "shadow of the law."[155] A distinct style, referred to as "evaluative mediation" has evolved,[156] influenced

146. Bush attributes the shift to mediation to the desire to find a substitute for arbitration in an evaluative mediation process. Bush, *supra* note 138, at 12. I believe that many consumers come to mediation for the reasons they have always used it, in a search for greater self-determination and informality.

147. 28 U.S.C. §471-82 (2000).

148. ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURT 4 (1996); JUDITH FILNER ET AL., CONFLICT RESOLUTION INSTITUTE FOR COURTS (1995).

149. 5 U.S.C. §§ 571-84 (2000).

150. 28 U.S.C § 651(b) (2000).

151. Bush, *supra* note 138, at 4-5.

152. The Uniform Mediation Act (UMA) provides rules for confidentiality and exceptions to confidentiality in mediation. The text of the UMA and the accompanying reporters' notes are available at http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm, or through the NCCUSL website at http://www.nccusl.org. *See generally* Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 157 (2002); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. DISP. RESOL. 1 (1995).

153. *See* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation,* 41 FLA. L. REV. 253 (1989).

154. My use of the term court-connected mediation does not include Small Claims mediation. While Small Claims mediation programs are operated under the auspices of courts, most of these programs use community mediators who tend to use the style of mediation found in the community/family context.

155. Community/facilitative mediation may also operate in the shadow of the law, but there is less focus on "the law" as predictive of the outcome.

156. For evidence of the evaluative nature of court-connected mediation in the Minnesota courts, see McAdoo & Welsh, *supra* note 125, at 422-24.

by the efficiency/economy goals, and, I assert, by litigation values. The shape of the mediation process itself has shifted, so that a court-annexed mediation looks quite different from a mediation at a community dispute resolution center. The mediators are usually lawyers, and in most cases the parties are represented by lawyers. The mediator frequently has subject-matter expertise regarding the issues in dispute, and usually asks the attorneys to file pre-mediation briefs outlining the facts and procedural history of the case, and legal arguments. While the parties themselves may be (but are not always) present at the mediation, the attorneys usually dominate the discussion, especially in joint sessions, when all the parties are in the same room. The issues discussed are factual and legal ones directly related to the claim, with limited attention to non-legal issues, relationships, emotions or emotional needs of the parties.

After the mediator's opening statement and initial statements from each side, the usual practice is for the mediator to separate the parties into two rooms and shuttle back and forth.[157] Typical mediator questions focus on the strengths and weaknesses of the legal case. Many mediators are willing to offer proposals for settlement, substantive advice or recommendations, or to give an assessment of the likely success of a legal argument. Much time is spent reality testing to move parties toward more "realistic" settlement offers. The measurement by which the mediator tests the parties' proposals is the likely outcome if the case were to go to trial.

The shift in value orientations toward litigation values in court-annexed/evaluative mediation is primarily along the individualism—collectivism and universalism—particularism dimensions. Smaller shifts can be seen in communication and power distance. In some egregious forms of court-connected/evaluative mediation, when the mediator really engages in "arm twisting" to the point that self-determination is compromised, locus of control is implicated as well.

a. Shift Toward Individualism. With its focus on legal rights and bargaining in the shadow of the law, court-annexed/evaluative mediation represents a shift toward individualistic litigation values, and the protection of individual rights, much like the litigation process.

b. Shift Toward Universalism. While facilitative mediation reflects particularist values, court-annexed/evaluative mediators encourage a more universalist approach by encouraging or even urging disputants to look to the likely court outcome to guide their decision-making, rather than to individual norms or negotiated agreements that fall outside the norms or law.

c. Shift Toward Low-Context, Monochronic Communication. While court-annexed/evaluative mediation is less formal than litigation or arbitration in terms of communication, the focus on legal rights and duties more than relationships is closer to a low-context style of communication than in community/facilitative mediation. Court-annexed/evaluative mediation is also more monochronic: with both mediators and attorneys usually charging an hourly fee, parties are doubtless more aware of time constraints than in the typical community mediation setting,

157. In some jurisdictions, mediators are dispensing with any joint session, keeping the parties in separate rooms during the entire process.

where the mediators are usually volunteers, and the parties are not accompanied by lawyers.

d. Shift Toward Higher Power Distance. While the court-annexed mediator has no decision-making authority, the mediator may exert greater pressure on parties to settle, and share her views on the strengths and weaknesses of the case. The pressure to settle and evaluative statements place the mediator in a relationship to the parties that is more like a judge or arbitrator, moving this type of mediation further toward the high end of the power distance continuum.

e. Shift Toward Higher Uncertainty Avoidance. Court-annexed mediation is more formal, and the focus on legal rights and likely trial outcomes based on precedent represents a shift toward higher uncertainty avoidance.

f. Shift Toward External Locus of control. Mediation is at the opposite end of the continuum from litigation and arbitration because the mediator is not a decision-maker. However, some court-connected/evaluative mediators give an opinion about the likely outcome of the case, moving this process closer to the external end of the locus of control continuum. The shuttle style of mediation vests the mediator with full responsibility for conveying information back and forth, giving the mediator complete control over what information is shared or not shared, how offers are conveyed, and even whether an offer is conveyed. Some court-connected mediators are known for coercive techniques that "always" result in settlement, which, while highly marketable, remove the locus of control from the parties toward the mediator.

III. CONCLUSION: APPLICATION AND IMPLICATIONS

It is important to recognize that dispute resolution in the United States has developed within a cultural context. As our society continues to become increasingly diverse and our interactions with the world at large increase, it is incumbent on those working within and designing dispute resolution systems to craft processes that are culturally congruent with the goals and values of the participants. It is my hope that the frameworks discussed in this article will be useful to lawyers and neutrals working with diverse clients, as well as to those seeking to export our processes abroad.[158]

As an illustration of the application of these principles to clients in a community mediation setting, I present two examples. In the first example, the parties are from two cultures with completely dissimilar dominant cultural values: Nepal and the United States. In the second example, both parties are from Nepal. In both situations, the challenge for the mediator, who is from dominant American culture, and trained in the broad facilitative style of mediation, is whether or how to adapt an "American" mediation model to fit the needs of the parties. I suggest the mediator consider three questions. First, what are the cultural underpinnings of the dispute resolution process she is trained to provide; in this case, broad, facilitative mediation? Second, what cultural value patterns apply here, and where

158. While I have not fully developed how these concepts could be applied to those taking American dispute resolution processes abroad, my analysis is relevant in that context.

might these parties fall along the continua?[159] And finally, should she adapt her process to make it more culturally congruent for these parties?[160]

Example 1. A Nepali family has come to a community mediation center (Center), seeking assistance to resolve a conflict with their landlord. We will assume that the landlord is a middle-class American with dominant American cultural values.[161] I suggest the mediator consider the three factors discussed above.

Cultural underpinnings of mediation process. The facilitative mediation process is consistent with three dominant American values: internal locus of control, medium power distance, and low uncertainty avoidance. It varies, however, from dominant American culture in that it is more collectivist, particularist, and allows for both low and high-context communication, and polychronic and monochronic time sense.

Cultural value patterns. We will assume that the Nepali family represents Nepali dominant culture.[162] Their values are highly collectivist and particularist, high power distance, high uncertainty avoidance, external locus of control, high-context style of communication, and polychronic time sense.[163] The American landlord's values are at the opposite end of the continuum on every one of these value pattern continua. Should the mediator adapt the process for these parties, who have completely differing values?

Adaptation. First, the mediator will compare the parties' values with process values: for the Nepali family, the primary value differences as compared to the mediation process are along the locus of control and power distance continua: facilitative mediation operates on the assumption of an internal locus of control and low power distance, and the Nepalis have an external locus of control and high power distance orientation. The values of the landlord, from dominant American culture, are consistent with a flexible mediation process that allows for both individualistic and universalist values to be expressed.

Can the process be congruent with both sets of values? Yes. In convening the case, the mediator should recognize that the head of the Nepali family will

159. Such an assessment requires the mediator to avoid stereotyping, and to rely on some cultural generalizations. Stereotyping assumes that all members of a cultural group will behave in a similar manner, without regard to individual variations. Cultural generalizations, on the other hand, allow us to generalize and discuss cultural patterns, while keeping in mind that individuals will vary within a cultural group. Bennett, *supra* note 11, at 5-7.

160. For an interesting study of approaches to conflict and preferences for a higher-status, evaluative mediator among the Cambodian community in Minnesota, see Nancy A. Welsh & Debra Lewis, *Adaptations to the Civil Mediation Model: Suggestion from Research into the Approaches to Conflict Resolution Used in the Twin Cities' Cambodian Community,* 15 MEDIATION Q. 345 (1998).

161. While for purposes of this example I assume that the family represents dominant Nepali culture, collectivists might not even bring such a dispute to a public forum for resolution. Collectivists generally prefer to avoid dealing directly with conflict or to deal with it privately. *See* HOFSTEDE, SOFTWARE, *supra* note 11, at 62.

162. I acknowledge that this assumption may not be accurate, in that often those who choose to leave and emigrate to another country are "deviants" whose values are not congruent with the dominant culture of their home country. As interculturalists say: "Never generalize from those who seek out the company of foreigners." Milton Bennett, opening plenary at the Summer Institute for Intercultural Communication, Forest Grove, OR, July 14, 2004.

163. *See* TROMPENAARS & HAMPDEN-TURNER, *supra* note 9, at 52 (research shows Nepali culture to be at extreme end of collectivism). The other cultural values described are based on interviews conducted by the author while living in Nepal, August 2003-January 2004.

likely be the spokesperson (high power distance), and the extended family will want to attend the mediation (collectivism). The Nepalis will likely approach the conflict indirectly, without explicitly naming it, and take some time to "get to the point" (high-context communication and polychronic time sense). They may expect that the neutral[164] will approach them from a position of power, and make a decision tailored to the situation at hand, rather than following established rules of law (external locus of control, high power distance and particularism). The landlord's expectations are likely to be that the neutral will behave in an informal manner and look to rules of law (low power distance and universalism), and that the discussion will address the conflict directly, and be linear and efficient (low-context communication and monochronic time orientation).

The Center can make the mediation table a place for a "new culture" where both sets of cultural values co-exist. A mediator with knowledge of the cultural frameworks and of the value conflicts at play will recognize the differing values, and adapt the process to accommodate both, without losing touch with the values of the Center's facilitative mediation process. Through pre-mediation discussions, and information imparted in her opening statement, the mediator should explain the process sufficiently to ensure that the tenants understand that the role of the mediator does not include decision-making. Allowing extended family members to attend (with notice to the landlord) and finding out whether they are comfortable using first or last names will show respect for different preferences. She should allow for storytelling and non-linear discussion (to accommodate the tenants' high-context communication style and polychronic time orientation), and use restating, paraphrasing and summarizing to increase understanding and make the process as efficient as possible to honor the landlord's monochronic time sense. The mediator can stay faithful to the essential features of the facilitative mediation process, while making adaptations to allow each side to operate within a zone of comfort.

Example 2. What if two Nepali families sharing similar values come to the Center? Can the facilitative mediation process adapt to accommodate these parties? I argue that because facilitative mediation is not congruent with the external locus of control and high power distance values of these disputants, a process similar to modified med-arb,[165] in which the neutral first conducts a mediation, adapting to high-context communication styles and collectivist values that would include extended family in the process, would be more culturally congruent. If the parties do not reach an agreement, and request it, the mediator could then become an arbitrator and make a decision. This type of process is similar to the traditional method of dispute resolution in Nepal, and many other traditional cultures, in which a trusted elder or community leader acts in the role of mediator/arbitrator.[166] The traditional process works well in rural Nepal because the

164. I use the term "neutral" to describe the facilitator of the process. The Nepali family, in fact, may assume that the facilitator is not neutral, and have a preference for a mediator that they know and who is familiar with the situation, much like the "trusted elder" style of dispute resolution that is common in rural areas of Nepal.

165. Med-arb refers to a hybrid of mediation and arbitration, in which the neutral third party conducts a mediation, and if there is no settlement, the mediator becomes a decision-maker, or arbitrator.

166. The United National Development Program/Nepal Office funded research on community dispute resolution practices in selected districts of Nepal in 2003. Gehendra Lal Malla, Final Report on Local Dispute Mediation Practices in the Bardia and Solukhumbu Districts (UNDP/Nepal, July 2003) (un-

third party is from the community, and motivated to find an outcome that preserves community harmony. Typically, the third party will continue living in the same community with the disputants for many years into the future.[167] The key to making a process similar to the Nepali traditional approach work in the United States would require finding trusted community members to serve as third parties, or finding alternative ways to acknowledge collectivist values, build a trust relationship, or establish some type of accountability for the decision-maker.

As demonstrated through these two short examples, when parties with differing values meet in dispute resolution processes, the approach is complicated exponentially. True facilitative mediation is not congruent with the individualist, universalist values of dominant American culture. This means that community/facilitative mediation offers a unique alternative to litigation, arbitration and court-annexed/evaluative mediation because it honors other important dominant American values that these other processes neglect: internal locus of control, low power distance, and low uncertainty avoidance. Despite the pull of American individualism and its accompanying universalism, this true alternative is worth preserving.

Awareness, understanding of the frameworks, and a willingness to be flexible will help lawyers, neutrals, and dispute resolution designers to recognize and honor their own cultural values, as well as the values that parties bring to the table with them. None of this will be easy, but it is critical that the dispute resolution field rise to and meet the challenges of our increasingly diverse world. With caring, flexibility, humility, openness to differences, and effective adaptation strategies, we can make the mediation table a place where different cultures can meet to create a new culture that is comfortable for all. This new culture would substitute curiosity for judgment and knowledge for ignorance in order to adapt processes to take account of differing sets of cultural values while honoring all.

published report, on file with the author); Final Report, Community Mediation Research Project, The Asia Foundation, Kathmandu, Nepal, January 20, 1995 (unpublished report, on file with the author).

167. Interview with Casper J. Miller in Kathmandu, Nepal (Dec. 12, 2003). *See also* CASPER J. MILLER, DECISION-MAKING IN VILLAGE NEPAL (2d ed. 2000). Father Miller's research was directed at helping development agencies increase the participation of local people in development projects designed to improve farm management practices.

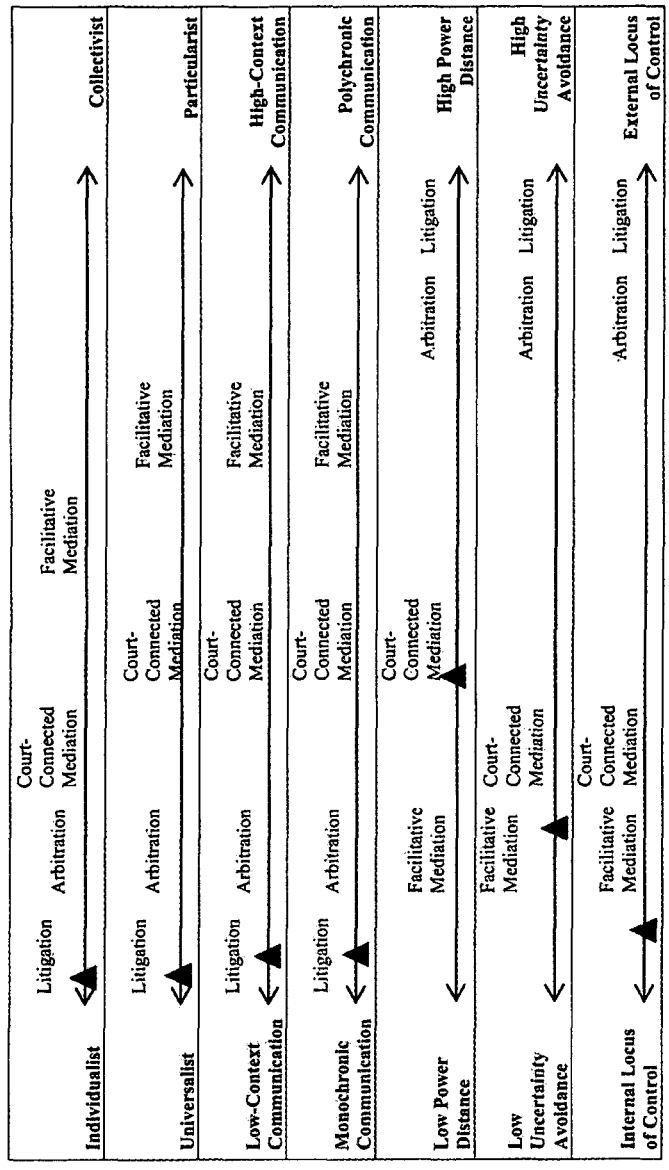
VALUE PATTERN CONTINUA
Approximate Location of Common Dispute Resolution Mechanisms
Litigation
Arbitration
Court-Connected Mediation
Facilitative Mediation
Individualist
Collectivist
Universalist
Particularist
Low-Context Communication
High-Context Communication
Monochronic Communication
Polychronic Communication
Low Power Distance
High Power Distance
Low Uncertainty Avoidance
High Uncertainty Avoidance
Internal Locus of Control
External Locus of Control
Approximate Location of Dominant U.S. Cultural Values

Figure 2